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Supreme Court, U.S.
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No. 95-1774

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

JOHN MURRAY, a/k/a John Costa,
by his mother and next friend, JOANNE MILLER,
Petitioner,

v.

FORD THOMPSON, Secretary, Department of Public Welfare,
and his predecessors, Commonwealth of Pennsylvania;
KAREN SCHNEIDER, Deputy Secretary for Mental
Health/Retardation, and her predecessors,
Department of Public Welfare;
and ERIC M. BOST, Facility Director,
Western Center, and his predecessors,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

PAUL A. TUFANO
General Counsel
Commonwealth of Pennsylvania
(Counsel of Record)

Office of General Counsel
225 Main Capitol
Harrisburg, PA 17120
Telephone: (717) 787-2551

JOHN A. KANE
Chief Counsel

HOWARD CHARLES [illegible]AN
Senior Assistant Counsel

Pennsylvania Department of Public Welfare
Office of Legal Counsel
305 Health & Welfare Building
Harrisburg, PA 17120
Telephone: (717) 783-2800

COUNSEL FOR RESPONDENTS

10PP

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether it is appropriate in an action under 42 U.S.C. Section 1983 for federal courts, which generally borrow state statute of limitations and tolling rules, to borrow state rules that do not toll for incompetence when they do not conflict with similar federal statutes.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari, which seeks review of a judgment order of the Third Circuit entered without published opinion, 77 F.3d 463 (table), which affirmed the district court's dismissal of petitioner's complaint as time-barred.

REASONS WHY THE PETITION SHOULD BE DENIED

I. PENNSYLVANIA'S TOLLING LAW, WHICH RUNS THE LIMITATIONS PERIOD AGAINST INCOMPETENTS, MIRRORS FEDERAL LAW, AND DOES NOT CONFLICT WITH IT.

Generally, federal courts borrow state statutes of limitation and tolling rules in 42 U.S.C. § 1983 cases. Hardin v. Straub, 490 U.S. 536 (1989). Petitioner asserts that because Pennsylvania law does not toll the running of the statute of limitations on account of incompetency, see Baily v. Lewis, 763 F.Supp. 802 (E.D. Pa.), aff'd, 950 F.2d 721 (3d Cir. 1991), it conflicts with the compensatory and deterrence purposes of § 1983, and therefore should not be borrowed in § 1983 cases. Pet. at 10-15.

Petitioner's assertion is readily defeated, however, by a single observation: there is no conflict with federal law. Under federal tolling rules, the result is the same as under Pennsylvania tolling rules. Since this Court's decision in Vance v. Vance, 108 U.S. 514, 521 (1883), as the Fourth Circuit recently explained, "the black-letter rule [in federal law] . . . is that a statute of limitations runs against all persons, even those under a disability, unless the statute expressly provides otherwise." Vogel v. Linde, 23 F.3d 78, 80 (4th Cir. 1994) (limitations period in Emergency Medical Treatment and Active Labor Act, 42

U.S.C. § 1395dd, runs against incompetents). See also Barren by Barren v. United States, 839 F.2d 987 (3d Cir.), cert. denied, 488 U.S. 827 (1988) (limitations period applicable to Federal Tort Claims Act, 28 U.S.C. §§ 2671 et seq., runs against incompetents). State tolling rules that mirror federal rules surely cannot be said to conflict with federal law.

Petitioner's observation that Pennsylvania is, among the states, in the minority on the question of tolling for incompetency, Pet. at 16, is simply irrelevant. Only conflict with federal law, not conflict with the law of other states, may be ground for departing from the general rule of borrowing state tolling law in § 1983 cases. See Hardin, 490 U.S. at 538-39.

II. THE JUDGMENT ORDER OF THE THIRD CIRCUIT DOES NOT CONFLICT WITH SEVENTH CIRCUIT LAW.

A. Tolling for Imprisonment Does Not Imply Tolling for Incompetency.

Even assuming arguendo that the Third Circuit's decision in this case were precedential -- which it is not, see Part II.B., infra -- petitioner's claim that it conflicts with Seventh Circuit equitable tolling doctrine as set forth in Heck v. Humphrey, 997 F.2d 355, 358 (7th Cir.

1993), aff'd on other grounds, 512 U.S. ___, 114 S.Ct. 2364 (1994), is baseless. Although equitable tolling claims were upheld as available in Heck but were rejected here, Pet. at A8, the circumstances were so different that the result in the one case cannot be said to conflict with the other. Heck concerned a prisoner; the instant case concerns an incompetent. The prisoner's incarceration was due to an act of the government; the petitioner's incompetency here was due to an act of nature. Such distinctions are often decisive. Cf. DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989).

B. The Third Circuit's Order Was Without Published Opinion and Has No Precedential Effect.

A Third Circuit judgment order does not constitute Third Circuit law for anyone except the parties. Under the Internal Operating Procedures of the Third Circuit, a judgment order such as the one from which relief is sought here, Pet. at A13-A14, may be entered when an opinion would have no "precedential or institutional value," 3d Cir. I.O.P. 6.2.1.

Accordingly, petitioner's assertion that there is a conflict between the Third Circuit's judgment order in this case and the Seventh Circuit's opinion on equitable tolling in Heck v. Humphrey, supra, is without

merit, regardless of the facts or the Third Circuit's ratio decidendi. The Third Circuit's judgment order, being merely a judgment order without precedential effect, is not law that can conflict with anything in any sense relevant here.[1]

III. EVEN IF FEDERAL EQUITABLE TOLLING WERE AVAILABLE TO § 1983 PLAINTIFFS, THE FACTS OF THIS CASE WOULD NOT WARRANT APPLICATION OF ANY EQUITABLE TOLLING DOCTRINE.

This § 1983 action was brought by petitioner's mother, who could have filed the action within the limitations period rather than after. There simply would be no factual ground for equitable relief in this case. It has not been alleged, for example, that respondents caused petitioner's incompetency, or hid the incompetent's injuries from his mother. See Magistrate Judge's Report at A9 ("each of the alleged injuries . . . was either readily apparent or readily discoverable").

Accordingly, if the federal equitable tolling doctrine were ever to override state tolling law in § 1983 cases, this case does not provide appropriate facts for such a holding.

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[1]That the district court has ordered publication of its opinion, Order of February 14, 1996, does not transform it into circuit law. See Anderson v. Romero, 72 F.3d 518, 525 (7th Cir. 1995).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DATE: June 3, 1996

PAUL A. TUFANO
General Counsel
Commonwealth of Pennsylvania
(Counsel of Record)

OFFICE OF GENERAL COUNSEL
225 MAIN CAPITOL
HARRISBURG, PA 17120
TELEPHONE: (717) 787-2551

JOHN A. KANE
Chief Counsel

HOWARD CHARLES ULAN
Senior Assistant Counsel

Pennsylvania Department of
Public Welfare
Office of Legal Counsel
305 Health & Welfare Building
Harrisburg, PA 17120
Telephone: (717) 783-2800

COUNSEL FOR RESPONDENTS